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STEPHEN E. MERRILL

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JEFFREY R. HOWARD

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BRIAN T. TUCKER

*G - where to file?*  
THE STATE OF NEW HAMPSHIRE

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GEOFFREY M. HUNTINGTON

INVESTIGATOR  
KEVIN J. MCCARTHY

PARALEGAL  
~~ANITA K. THUNBERG~~  
Marcia A. B. Thunberg

THE ATTORNEY GENERAL  
ENVIRONMENTAL PROTECTION BUREAU  
STATE HOUSE ANNEX  
25 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

(603) 271-3679

*JAN 10 1989*

September 26, 1988

Delbert F. Downing, Director  
Water Resources Division  
Department of Environmental Services  
64 North Main Street  
Concord, New Hampshire 03301

RE: DIERK'S DAM APPLICATION

Dear Mr. Downing:

We have reviewed your inquiry concerning the applicability of RSA 482:3 and RSA 482:19 to the dam construction proposal submitted to the Water Resources Division by Mr. E.K. Dierks. As we understand it, you are requesting clarification of two issues relating to the pending application:

1. Whether the filing requirements of RSA 482:3 apply to construction of this dam which will be located upstream of an existing dam structure which is in disrepair; and
2. Whether the proposed dam is being constructed for uses requiring the applicant to file a flowage petition with the Water Resources Division pursuant to RSA 482:19, thereby necessitating that an administrative hearing be held and an order be issued before the project may proceed.

It is our determination that while the filing requirements of RSA 482:3 must be met by the applicant, no flowage petition need be submitted as this structure is not being proposed for any of the purposes encompassed by RSA 482:19 and 16.



Application of RSA 482:3

RSA 482:3,I requires that any person proposing to construct or reconstruct a dam file a statement with the Water Resources Division ("Division") disclosing the height and location of the structure as well as any other pertinent information which the Division may require<sup>1</sup>. Mr. Dierk's proposal is unusual insomuch as he seeks neither to reconstruct an existing dam which is in disrepair, nor build a new one downstream thereby creating an enlarged impoundment of water. Rather, Mr. Dierks proposes to construct a dam upstream of the existing structure which will remain in place.

Although this development scenario is unique among those proposals generally before the Division, a preliminary filing must, nonetheless, be made pursuant to RSA 482:3,I. Clearly, Mr. Dierks will be building a new structure which comports precisely with the definition set forth in RSA 482:1,II of a dam: "...any artificial barrier, including appurtenant works, which impounds or directs water...." Once this threshold determination is reached, then the remaining circumstances surrounding placement or use of the structure have no relevance in determining whether RSA:482:3 is applicable. An adequate filing, therefore, must be submitted.

RSA 482:19 Flowage Petition

RSA 482:19 requires that any person who proposes to build a dam, or increase the height of an existing dam, "for any of the purposes provided in RSA 482:16" must file a flowage petition with the Division which must then hold an administrative hearing to determine whether to approve the proposed project. See RSA 482:19, 20 and 21. A flowage petition must be filed, however, only when the proposed dam is being constructed for any of the purposes stated in RSA 482:16 -- historically referred to as the Mill Dam Act. These purposes include:

....raising the water to work any mill or mills...or....  
for the purpose of creating a reservoir or raising the  
level of a public or other lake or pond to control,  
conserve or equalize the flow of streams for the benefit or  
any such mill or mills...

RSA 482:16. "Mill" as is used in RSA Chap. 482 is defined as including dams used for generating electric power for "public" distribution, or for the operation of mills, railroads or public utilities." RSA 482:1,IV.

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<sup>1</sup>RSA 482:3,I states: "No person shall begin the construction or reconstruction of any dam until 10 days after he has filed with the division of water resources a statement of the height of the proposed dam and the location at which it is to be erected and such other information as the Division may require."

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While the proposal forwarded by Mr. Dierks will produce electricity, there will be no sale to a public utility, no distribution to the public, and no use of the power by Mr. Dierks for non-residential purposes. The dam will be used to serve the exclusive electrical needs of the Dierk's residence without further distribution of power to other entities. There is, then, no basis in existing statutes for requiring submission of a flowage petition for consideration and hearing by the Division pursuant to RSA 482:19 and subsequent provisions.

I trust this is responsive to your inquiry. Please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Geoffrey M. Huntington". The signature is fluid and cursive, with a long horizontal stroke at the end.

Geoffrey M. Huntington  
Assistant Attorney General  
Environmental Protection Bureau

GMH/jlc

0-88-007